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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

REBECCA FLORES,

Plaintiff and Respondent,

v.

THOMAS E. DANKS,

Defendant and Appellant.

G056128

(Super. Ct. No. 30-2016-00862403)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Glenn R. Salter, Judge. Affirmed in part, vacated in part, and remanded with directions.

Adams & Pham, Joseph M. Adams, Jeff H. Pham and Donald A. Green for Defendant and Appellant.

Law Offices of John S. Roth and John S. Roth for Plaintiff and Respondent.

In this breach of contract and fraud case, defendant Thomas E. Danks appeals from a posttrial judgment awarding plaintiff Rebecca Flores approximately \$2

million in damages, including about \$900,000 in prejudgment interest. Defendant contends the trial court, which acted as the trier of fact, erred in concluding plaintiff's claims were not barred by the applicable statutes of limitations. In addition, he challenges the prejudgment interest as being excessive because the court used an interest accrual date which contradicts its factual findings on plaintiff's breach of contract cause of action.

We find no error in the trial court's findings and conclusions concerning the timeliness of plaintiff's claims. However, we agree the prejudgment interest award cannot stand in light of the trial court's underlying factual findings. Consequently, we vacate that portion of the award and remand the matter so the trial court may recalculate prejudgment interest in accordance with this opinion and our directions.

### **FACTS<sup>1</sup>**

Plaintiff and defendant used to be engaged, but they never married. During their relationship, defendant co-owned a business (the business) along with other investors. Being sophisticated in the business world, defendant was the chief operating officer.

Plaintiff had only a 10th grade education, but her prior marriage which ended in divorce resulted in her receiving substantial lifetime spousal support and child support. The couple knew she would no longer receive spousal support once they were married, so defendant encouraged her to negotiate a one-time lump sum spousal support payment. She and her legal counsel did so to the tune of roughly \$1.2 million.

Hard times hit the business. Believing she could trust defendant, plaintiff put most of her lump sum payment—approximately \$1.095 million—into the business over the course of about one year. For the amounts characterized as loans, plaintiff

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<sup>1</sup> The trial court made factual findings in its statement of decision. Because defendant does not challenge those findings, we draw the factual background of this case primarily from them.

received promissory notes, and for the amounts characterized as capital investments, she received a percentage share of the business.

Thereafter, the couple got engaged and agreed they would wed two years later. Within months, the business relationship between defendant and the other original investors deteriorated so much they parted ways. After a settlement agreement, plaintiff and defendant were the only two remaining owners and operators of the business.

To assist the struggling business, plaintiff and defendant applied for and received a \$400,000 line of credit from a bank. She provided a personal guarantee and used her home as collateral. They agreed, however, each of them would be responsible for repayment of half of the amounts drawn from the line of credit.

The business continued to go downhill. Less than two years later, it came to an end. That same month, defendant called off his engagement to plaintiff and the couple separated for good.

Despite their separation, defendant repeatedly told plaintiff “he would see to it that [she] would receive back all of the money (‘every cent’) [she] had put into [the business].” She threatened to sue him unless he put his promise in writing. He insisted she not sue and instead give him time to pay. According to him, “it would take ‘a few years’ for him to make good on his promise[.]” Plaintiff took his statement to mean three to four years.

Defendant’s written confirmation came on July 10, 2011, when he signed and e-mailed to plaintiff a “Repayment Agreement,” by which he agreed to repay her \$1.095 million. The agreement did not specify a date for performance. In case he was mistaken in the amount owed, defendant gave plaintiff an opportunity to modify the agreement. She did not do so.

In the roughly eight months thereafter, defendant got engaged to a friend from his past and, unbeknownst to plaintiff at the time, moved to Hawaii. Around that time, in May 2012, plaintiff lost contact with defendant. Despite her occasional effort to

locate and contact him through mail and text messages, she was unsuccessful. She made her last attempt in September 2014.

Plaintiff filed suit on July 8, 2016, alleging breach of contract, fraud and negligent misrepresentation. The matter proceeded to a bench trial, during which both plaintiff and defendant testified. Among the defenses raised by defendant were the statutes of limitations.

Following closing arguments, the court took the matter under submission and later issued a minute order in plaintiff's favor. In the court's subsequent written statement of decision, drafted by plaintiff, it found plaintiff, but not defendant, credible. It concluded the repayment agreement was valid and enforceable, and held defendant breached it by not paying any amount due under it "even though he had a reasonable time to do so."

In addition, the court concluded defendant owed a fiduciary duty toward plaintiff both because of their business relationship and their personal relationship. It found defendant misrepresented he would repay plaintiff every cent she contributed to the business, with the court explaining he "never had any intent to repay [plaintiff], and still does not have any intent to repay her even though he testified that he did." Lastly, the court rejected defendant's statute of limitations arguments.

The judgment awarded plaintiff \$1.095 million in damages, plus prejudgment interest at a rate of 10 percent from July 10, 2011, resulting in a total award of roughly \$2 million. Defendant timely appealed.

## **DISCUSSION**

Defendant contends judgment in plaintiff's favor was error because both the breach of contract and fraud causes of action are time-barred. He also challenges the award of prejudgment interest, claiming the date from which the court ordered it to accrue directly conflicts with the court's breach of contract findings. We find no error in

the court's statute of limitations determinations. However, we agree the court erred as to the date on which prejudgment interest began to accrue.

1. *Statute of limitations*

“The purpose of statutes of limitations is to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. [Citation.] The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation . . . .” (*Cutujian v. Benedict Hills Estates Assn.* (1996) 41 Cal.App.4th 1379, 1387-1388.)

California provides a four-year statute of limitations for commencing a civil action based on a written contract (Code Civ. Proc., § 337), and a three-year statute of limitations for a fraud case of action (Code Civ. Proc., § 338, subd. (d)). The parties agree these are the applicable limitations periods. Where they disagree is when the causes of action accrued—i.e., when the clock began to tick on each statute of limitations.

“[I]n ordinary tort and contract actions, the statute of limitations . . . begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action . . . does not toll the statute.” (*April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 826 (*April Enterprises*)). Given the potential harshness of the general rule, there is a well-established corollary—the discovery rule—employed in cases “where it is manifestly unjust to deprive plaintiffs of a cause of action before they are aware that they have been injured.” (*Ibid.*)

“[A] cause of action under the discovery rule accrues when the plaintiff discovers or should have discovered all facts essential to his cause of action . . . ; this has been interpreted . . . to be when “plaintiff either (1) actually discovered his injury and its negligent cause[,], or (2) could have discovered [the] injury and cause through the exercise of reasonable diligence.” (*April Enterprises, supra*, 147 Cal.App.3d at p. 826.) Thus, for example, the statute of limitations in a fraud cause of action starts running no

later than when one learns of facts “sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry . . . .” (*Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118, 130; see also *April Enterprises*, at p. 832 [discovery rule may be applied to breach of contract cause of action].)

Determinations concerning the accrual of a cause of action, including at what point in time a plaintiff could have discovered the injury and cause through the exercise of reasonable diligence, typically involve factual inquiries and are, therefore, for the trier of fact. (*April Enterprises, supra*, 147 Cal.App.3d at p. 833; *Schaefer v. California-Western States Life Ins. Co.* (1968) 262 Cal.App.2d 840, 845.) The same is generally true for overall resolution of a statute of limitations defense. (*City of San Diego v. U.S. Gypsum Co.* (1994) 30 Cal.App.4th 575, 582.) Hence, we apply a substantial evidence standard of review in this appeal, viewing the evidence in the light most favorable to plaintiff. (*Institoris v. City of Los Angeles* (1989) 210 Cal.App.3d 10, 17.)

Regarding plaintiff’s breach of contract cause of action, the trial court found the claim accrued three to four years after defendant executed and delivered to plaintiff the repayment agreement. Substantial evidence supports the court’s determination. Because the repayment agreement did not specify a time for performance, defendant had a reasonable amount of time to perform. (Civ. Code, § 1657 [if contract does not specify time for performance, a reasonable time is allowed]; *Eidsmore v. RBB, Inc.* (1994) 25 Cal.App.4th 189, 198 [same].) The court implicitly concluded three to four years was reasonable under the circumstances. Plaintiff’s testimony, which the court found credible, supports the conclusion because she testified defendant said he would need “a few years” to get her the money. Thus, when defendant did not meet the three to four year repayment deadline (roughly July 2014-July 2015), the breach of contract cause of action accrued and the limitations period began to run. Based on that timing, plaintiff’s 2016 complaint was filed well within the four-year breach of written contract statute of limitations.

Defendant contends plaintiff's cause of action accrued much earlier. Citing a portion of Civil Code section 1657, he argues performance was due immediately after he gave plaintiff the signed repayment agreement. But defendant misapplies the statute.

Civil Code section 1657 states, in relevant part: "If no time is specified for the performance of an act . . . [and] [i]f the act is in its nature capable of being done instantly[,] . . . it must be performed immediately . . . ." Although the statute provides the payment of money as an example of an act capable of being done immediately, the evidence in this case demonstrated defendant's repayment could not happen right away. Aside from plaintiff's testimony defendant said he needed "a few years[.]" Defendant himself testified that at the time he signed the repayment agreement, he was not able to repay plaintiff immediately. The business had just folded and he was trying to reestablish himself.

The trial court's rejection of defendant's statute of limitations defense as to the fraud and negligent misrepresentation claims are similarly supported by substantial evidence. Based on evidence the court deemed credible, it found defendant "never had any intent to repay [plaintiff], and still does not have any intent to repay [plaintiff] even though he testified that he [does]." Although defendant "knew that his representation was false when he made it," plaintiff did not and had no reason to so believe. And from the evidence, it is reasonable to conclude the earliest she would have had reason to suspect defendant lied about repayment was when he did not follow through with any money after three to four years.

For these reasons, we conclude the trial court did not err in finding plaintiff's claims were not barred by the statutes of limitations.

## 2. *Prejudgment interest*

On plaintiff's breach of contract cause of action, the court awarded prejudgment interest dating back to July 10, 2011, the date on which defendant sent the signed repayment agreement to plaintiff. Defendant claims this is error because it conflicts with the trial court's finding breach of the agreement did not occur until three to four years later. We agree.

"Prejudgment interest, by its nature, differs from other more typical forms of interest. It is a creation of statute designed to compensate for the presumed harm caused by the inevitable delays inherent in litigation. While the party that ultimately prevails awaits final judgment in his or her favor, the losing party enjoys the use of the funds in question as the lawsuit winds its way through the courts. Thus, "[t]he purpose of prejudgment interest is to compensate plaintiff for [the] loss of use of his or her property.'" (*Union Pacific Railroad Co. v. Santa Fe Pacific Pipelines, Inc.* (2014) 231 Cal.App.4th 134, 198.)

We cannot reconcile the trial court's award of prejudgment interest with the relevant statutory directive. "[Civil Code] [s]ection 3287, subdivision (a) allows a person to recover prejudgment interest on 'damages certain, or capable of being made certain by calculation' . . . .<sup>[2]</sup> '[T]he court has no discretion, but must award prejudgment interest upon request, from the first day there exists both a breach and a liquidated claim.' [Citation.]" (*Warren v. Kia Motors America, Inc.* (2018) 30 Cal.App.5th 24, 43; see also Civ. Code, § 3289 [if contract lacks stipulated interest rate, interest rate shall be "10

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<sup>2</sup> Subdivision (a) of the statute provides, in full: "A person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in the person upon a particular day, is entitled also to recover interest thereon from that day, except when the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state."



percent per annum after a breach”].) The plain language of the statute is clear: prejudgment interest may not date back to a time before the breach of contract occurred. This is logical, as an award of prejudgment interest from a time before performance was due under the contract would be an unjustified windfall.

Here, the trial court found the breach occurred sometime between July 10, 2014 and July 10, 2015. It was error to award interest for the three to four years prior to those dates, and we must vacate this portion of the judgment. (See *Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 992 [vacating prejudgment interest award calculated from date earlier than breach].)

Because the type of prejudgment interest at issue begins to accrue on the date of breach, the trial court on remand must amend its statement of decision to specify a precise date on which breach of the repayment agreement occurred. Thereafter, an amended judgment must be entered, with prejudgment interest recalculated based on the court’s date of breach finding.

### **DISPOSITION**

The portion of the judgment awarding plaintiff prejudgment interest is vacated. The judgment is affirmed in all other respects. On remand, the trial court shall (1) amend its statement of decision to specify a precise date on which breach of the repayment agreement occurred; and (2) recalculate prejudgment interest based on the date of breach finding and enter an amended judgment consistent therewith. Respondent is entitled to her costs on appeal.

THOMPSON, J.

WE CONCUR:

MOORE, ACTING P. J.

IKOLA, J.